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In the Supreme Court of the United States

OCTOBER TERM, 1996

BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND, PETITIONER

v.

FERBAR CORPORATION OF CALIFORNIA, INC., AND STEPHEN BARNES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the statute of limitations for an action to collect withdrawal liability under Section 104(2) of the Multiemployer Pension Plan Amendments Act, 29 U.S.C. 1451(f), begins to run on the date an employer withdraws from a pension plan or some other date.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.[1]

[1] The Pension Benefit Guaranty Corporation (PBGC) is the federal agency responsible for administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301 *et seq.*, including the provisions added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. 1381 *et seq.* The PBGC has an interest because this case requires an interpretation of 29 U.S.C. 1451(f), which governs the time for filing a civil action under MPPAA. In addition, the PBGC has an interest because petitioner is an insolvent multiemployer pension plan entitled to receive financial assistance from the PBGC under 29 U.S.C. 1431. If petitioner prevails in this litigation, the PBGC's obligations under 29 U.S.C. 1431 could be reduced.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the statutory and regulatory provisions set out at Pet. App. 30a-49a, the following provisions of 29 U.S.C. 1382, 1399 and 1451, as added to Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1217, are relevant to this case:

1. Section 1382 of Title 29 U.S.C. provides:

Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of withdrawal liability from the employer.

2. Section 1399 of Title 29 U.S.C. provides, in relevant part:

Notice, collection, etc., of withdrawal liability

* * * * *

(c) Payment requirements; amount etc.

(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 and then under section

1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C) * * *. Actual payment shall commence in accordance with subparagraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

* * * * *

3. Section 1451 of Title 29 U.S.C. provides, in relevant part:

Civil Actions

* * * * *

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

* * * * *

STATEMENT

1. Under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), an employer that withdraws from a multiemployer pension plan is required to pay

"withdrawal liability," calculated pursuant to one of four statutory methods for determining the employer's allocable share of the plan's unfunded vested liabilities. 29 U.S.C. 1381, 1391. Withdrawal liability protects the financial stability of multiemployer plans and the retirement income of millions of participants by requiring withdrawing employers to pay a "proportionate share of the plan's 'unfunded vested benefits.'" *Connolly* v. *PBGC*, 475 U.S. 211, 217 (1986) (quoting *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 725 (1984)). By requiring a withdrawing employer to pay its fair "share of the plan's obligations," *Connolly*, 475 U.S. at 225, Congress ensured that those obligations would not fall on the remaining employers and discourage new employers from joining the plan. *Gray*, 467 U.S. at 721-723. Withdrawal liability is thus the cornerstone of Congress's efforts to protect multiemployer plan participants against benefit losses.

A "complete withdrawal" from a multiemployer pension plan occurs when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. 1383(a). When an employer withdraws from a multiemployer plan, MPPAA requires the plan sponsor (usually a joint labor-management board of trustees, 29 U.S.C. 1002(16)(B)) to "(1) determine the amount of the employer's withdrawal liability, (2) notify the employer of the amount of the withdrawal liability, and (3) collect the amount of the withdrawal liability from the employer." 29 U.S.C. 1382.

"As soon as practicable" after an employer's withdrawal, MPPAA requires the plan sponsor to notify the employer of its withdrawal liability and the schedule for liability payments, and to demand payments in accordance with that schedule. 29 U.S.C. 1399(b)(1). The schedule must amortize the amount of withdrawal liability in "level

annual payments" in accordance with a statutory formula, based in part on the employer's previous contributions to the plan. 29 U.S.C. 1399(c)(1)(A)(i) and (C)(i). For amortization periods that exceed 20 years, the employer's liability usually is limited to the first 20 annual payments. 29 U.S.C. 1399(c)(1)(B). The Act requires the plan sponsor to set forth a schedule for payment of the annual amount of withdrawal liability in four equal installment payments due quarterly or at other intervals specified by plan rules. 29 U.S.C. 1399(c)(3). The Act also permits the employer, however, "to prepay the outstanding amount of the unpaid annual withdrawal liability," plus accrued interest. 29 U.S.C. 1399(c)(4). See *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 115 S. Ct. 981, 986 (1995).

Within 90 days after the employer receives the plan sponsor's notice and demand for payment, the employer is entitled to ask the plan sponsor "to review any specific matter relating to the determination of the employer's liability and the schedule of payments." 29 U.S.C. 1399(b)(2)(A)(i). "After a reasonable review of any matter raised," the plan sponsor must notify the employer of the plan sponsor's decision and the reasons for that decision. 29 U.S.C. 1399(b)(2)(B).

MPPAA then provides that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under [29 U.S.C. 1381-1399] shall be resolved through arbitration." 29 U.S.C. 1401(a)(1). Either party may initiate arbitration within a 60-day period ending after the earlier of (1) the date of notification to the employer of the plan sponsor's decision under 29 U.S.C. 1399(b)(2)(B), or (2) 120 days after the date of the employer's request for review under 29 U.S.C. 1399(b)(2)(A). See 29 U.S.C. 1401(a)(1).

"[N]otwithstanding any request for review or appeal of determinations of the amount of [withdrawal] liability or of the schedule," the employer's withdrawal liability becomes "payable in accordance with the schedule set forth by the plan sponsor" beginning no later than 60 days after the date of the plan sponsor's demand. 29 U.S.C. 1399(c)(2). Similarly, "until the arbitrator issues a final decision with respect to the determination submitted for arbitration," the employer is required to make payments in accordance the plan sponsor's schedule of payments, subject to "any necessary adjustments in subsequent payments for overpayments or underpayments" arising out of the arbitrator's decision. 29 U.S.C. 1401(d). If no arbitration proceeding has been initiated within the period prescribed by 29 U.S.C. 1401, "the amounts demanded by the plan sponsor under [29 U.S.C. 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor," and "[t]he plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection." 29 U.S.C. 1401(b)(1).

In the event of "default," "a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made." 29 U.S.C. 1399(c)(5). A PBGC regulation further provides that, upon default, a plan sponsor may require immediate payment of only a portion of the outstanding amount of the employer's liability. 29 C.F.R. 4219.31(b)(2).[2] If the plan sponsor chooses the latter course, the sponsor must establish a new schedule of payments for the remaining amount. *Ibid.*

[2] Prior to July 1, 1996, regulations promulgated under MPPAA by the PBGC appeared at 29 C.F.R. Pts. 2640-2677.

The Act defines "default" to include "the failure of an employer to make, when due, any payment under [29 U.S.C. 1399], if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure." 29 U.S.C. 1399(c)(5)(A); see also 29 C.F.R. 4219.31(b)(1).[3] PBGC regulations also set forth rules that apply to the employer's obligation to make withdrawal liability payments during the period for plan review and arbitration. In those instances, a default as a result of a failure to make payments does not occur until the sixty-first day after the last of (1) the expiration of the 90-day period within which the employer may request review under 29 U.S.C. 1399(b)(2)(A); (2) if review is requested within those 90 days, the expiration of the period within which arbitration may be initiated under 29 U.S.C. 1401(a)(1); or (3) if arbitration is timely initiated, the date the arbitrator issues a decision. 29 C.F.R. 4219.31(c)(1).

A plan fiduciary "who is adversely affected by the act or omission of any party" under MPPAA "may bring an action for appropriate legal or equitable relief" in federal district court. 29 U.S.C. 1451(a)(1) and (c). Such action is barred "after the later of—(1) 6 years after the date on which the cause of action arose, or (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action." 29 U.S.C. 1451(f).

2. For several years, respondent Ferbar Corporation contributed to the Bay Area Laundry and Dry Cleaning

[3] 29 C.F.R. 4219.31(a) defines an "overdue" withdrawal liability payment as one "not paid on the date set forth in the schedule of payment established by the plan sponsor."

Pension Trust Fund (Fund). In March 1985, Ferbar ceased making contributions to the Fund. On December 12, 1986, the Fund sent Ferbar a notice assessing a withdrawal liability obligation of $45,580.80. Pet. App. 2a. The notice stated that Ferbar could discharge its withdrawal liability obligation by paying the total amount within 60 days of receipt of the letter, or by paying monthly installment payments of $345.50 for 240 months (with a final payment of $344.96), beginning February 1, 1987. *Id.* at 2a-3a; Compl. ¶ 14; C.A. E.R. Tab 13. Ferbar made no payments in response to the Fund's demand.

In a letter dated February 27, 1987, Ferbar requested that the Fund review its assessment of withdrawal liability. In a letter dated April 14, 1987, the Fund notified Ferbar that its first payment was delinquent and that Ferbar had 60 days from the date of that notice to cure the delinquency, or it would be considered in default. Pet. App. 3a. Ferbar failed to cure its delinquency, but in a letter dated April 28, 1987, Ferbar referred to its previous response and asked when the Fund's answer would be forthcoming. *Ibid*; Br. in Opp. 6. In a letter dated July 8, 1987, Ferbar requested arbitration of its disputed withdrawal liability. Pet. 5. No arbitration proceedings were held, and Ferbar did not make any withdrawal liability payments. Pet. App. 7a; Br. in Opp. 6.

On February 9, 1993, petitioner, the Board of Trustees of the Fund, filed a complaint against Ferbar and its shareholder, Stephen Barnes, in the United States District Court for the Northern District of California to collect the employer's withdrawal liability.[4] The parties filed

[4] Petitioner also sued Ferreira Farms, Inc., and Diablo Cleaners, Inc., two dry cleaners, and Robert J. Ferreira, a shareholder in Ferreira Farms, Diablo Cleaners, and Ferbar. Compl. ¶¶ 7-10. On June 3, 1994, petitioner dismissed those defendants from the complaint. C.A. E.R. Tab 31.

cross-motions for summary judgment on whether the statute of limitations had expired. Pet. App. 6a-7a. On May 9, 1994, the district court granted summary judgment in favor of respondents. *Id.* at 6a-19a. The court first held that the suit was barred by the three-year limitations period set forth in 29 U.S.C. 1451(f)(2), because "plaintiffs knew a cause of action existed no later than 1987, yet filed their complaint in excess of three years of that time." Pet. App. 11a (citation omitted). In the alternative, the court held that petitioner's action was barred by the six-year limitations period set forth in 29 U.S.C. 1451(f)(1). Pet. App. 11a-19a. The court reasoned that the Fund was "adversely affected when the first monthly payment was not made" by the February 1, 1987 due date and, therefore, that petitioner's "cause of action arose and, concomitantly, the statute of limitations began running," on February 1, 1987. *Id.* at 13a. Because February 1, 1987 "preced[ed] the filing of the lawsuit by more than six years," the court concluded that the action was time-barred. *Id.* at 19a.

3. The court of appeals affirmed, but on different grounds. Pet. App. 1a-5a. The court of appeals first held that the district court erred in relying on the three-year limitations period set forth in 29 U.S.C. 1451(f)(2). The court explained that "the district court misread the plain language of [29 U.S.C.] 1451(f), which clearly directs courts to apply 'the later of' the two periods of limitations." Pet App. 3a. "On the facts of this case," the court concluded, the later limitations period "is six years from the date the cause of action arose." *Ibid.*

Turning to the district court's alternative holding that petitioner's cause of action became time-barred six years after February 1, 1987, the date on which the employer

missed its first installment payment, the court of appeals determined that its decision in *Board of Trustees* v. *Thibodo*, 34 F.3d 914 (9th Cir. 1994), cert. denied, 115 S. Ct. 1361 (1995), was controlling. In *Thibodo*, the Ninth Circuit held that "for actions to recover withdrawal liability incurred as a result of complete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met." *Id.* at 916-917. The court of appeals recognized that "*Thibodo* by its terms applies only to actions arising under 29 U.S.C. § 1383(b), which defines the conditions for complete withdrawal only in the building and construction industry," and that the present case is governed by 29 U.S.C. 1383(a), which defines complete withdrawal for most other industries. Pet. App. 4a-5a. The court saw "no basis for distinguishing" the two types of actions, however, and concluded that "the period of limitations began running in March, 1985, when [respondent] effected a complete withdrawal from the Fund." *Id.* at 5a. Because the Fund's February 9, 1993, complaint was filed more than six years later, the court of appeals affirmed the district court's order granting summary judgment for respondents on the ground that the action is time-barred. *Ibid.*

Judge Trott wrote a concurring opinion. Pet. App. 5a. In his view, the decision in *Thibodo* compelled the result reached by the court. *Ibid.* He expressed the view, however, that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Joyce* v. *Clyde Sandoz Masonry*, 871 F.2d 1119, cert. denied, 493 U.S. 918 (1989) "does a better job of answering the questions" posed by this case. Pet. App. 5a. In *Joyce*, the court held that a pension plan's cause of action for withdrawal liability does not arise on the date an employer effects a complete withdrawal. Rather, the court held that

an employer's failure to pay a scheduled payment triggers the running of the limitations period under MPPAA. 871 F.2d at 1122-1124.

DISCUSSION

There are approximately 2,000 defined-benefit multiemployer pension plans in the United States, covering an estimated 8.7 million active and retired workers. As construed by the court of appeals, the limitations period in 29 U.S.C. 1451(f)(1) would be immediately triggered every time an employer withdraws from one of those plans, before the plan sponsor has even determined the amount of the employer's liability and set a payment schedule. If a plan sponsor's cause of action to collect withdrawal liability payments arises on the date of withdrawal, the plan sponsor's ability to collect withdrawal liability payments could be significantly affected. The circuits are in conflict on the proper date on which a cause of action arises in a suit by a plan sponsor to collect an employer's withdrawal liability. Many large multiemployer plans—such as amicus Central States, Southeast and Southwest Areas Pension Fund—have contributing employers in several States. The plans and their contributing employers may thus be subject to different statutes of limitations, depending on the happenstance of the forum for litigation. Review of the statute of limitations issue by this Court therefore is warranted.

1. Under the Ninth Circuit's decision in this case, a cause of action for collection of withdrawal liability arises on the date of withdrawal. The Third, Seventh, and District of Columbia Circuits have taken contrary views.

a. In *Joyce* v. *Clyde Sandoz Masonry*, 871 F.2d 1119, cert. denied, 493 U.S. 918 (1989), the District of Columbia Circuit rejected the view that the six-year limitations period commences on the date of the employer's complete

withdrawal from the plan. The court reasoned that "[t]he employer's complete withdrawal, without more, is an occurrence that hardly affects the plan adversely, but merely sets in motion the usual (and routine) process of calculation, notification, schedule, possible request for review or arbitration, and payment." 871 F.2d at 1124. The court also observed that under MPPAA, "[b]y virtue of withdrawal alone * * *, the employer is not immediately obligated to make payments, nor is the plan * * * entitled to receive any such payments." *Id.* at 1123. Instead, the court noted, a plan is "adversely affected" under 29 U.S.C. 1451(a) only once the plan "fails to receive the payment it has demanded and to which it is entitled." *Id.* at 1124. Thus, the court concluded that it is the employer's "failure to pay the sum demanded" that "giv[es] rise to a cause of action," *id.* at 1122, and therefore triggers the running of the limitations period.

b. The D.C. Circuit's decision in *Joyce* did not directly address the further refinement of the statute of limitations issue that was confronted by the Third Circuit in *Board of Trustees* v. *Kahle Engineering Corp.*, 43 F.3d 852 (1994), and the Seventh Circuit in *Central States Pension Fund* v. *Navco*, 3 F.3d 167 (1993), cert. denied, 510 U.S. 1115 (1994).

The Seventh Circuit in *Navco* held that a claim to collect withdrawal liability under MPPAA "accrues as soon as payment becomes overdue." 3 F.3d at 172. The court concluded, however, that a fund "ha[s] only one *claim* against the employer * * * : the amount of withdrawal liability." *Ibid.* The court reasoned that "[a]lthough a fund may permit an employer to amortize this sum over 20 years, the whole amount is presumptively due at the outset." *Ibid.* Thus, according to the Seventh Circuit, "the financing options under [Section] 1399(c) do not break this single debt into little pieces with their own statutes

of limitations," *ibid.*, and the statute of limitations for collecting the entire outstanding balance is triggered whenever the employer misses a single payment, *id.* at 172-173.

In *Kahle*, the Third Circuit rejected the Seventh Circuit's view that a plan sponsor has only one cause of action to sue for an employer's failure to pay its withdrawal liability. The Third Circuit saw the employer's obligation to make scheduled payments under MPPAA as "akin" to an installment contract, in which "a new cause of action arises from the date each payment is missed." 43 F.3d at 857 (citing 4 Arthur L. Corbin, *Contracts* § 951 (1951)). The court thus concluded that "[a]bsent a decision by the [f]und to accelerate," a fund is "not time-barred from bringing suit for the total of the * * * payments which fell due within the six years prior to the filing of * * * suit." *Id.* at 861.

2. a. The confusion that this disparate appellate authority has generated for plan administrators and contributing employers is manifest. Multiemployer plans may have contributing employers conducting business in several circuits. Those plans and employers are currently subject to at least three different rules for when the statute of limitations begins to run on an action to collect an employer's withdrawal liability. See Central States, Southeast and Southwest Areas Pension Fund Amicus Br. 4-5. Plans and their contributing employers cannot be certain how to apply the law, and they may find themselves involved in litigation in any of several jurisdictions operating under differing versions of the same limitations law.[5]

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[5] An action to collect withdrawal liability may be brought "in the district where the plan is administered or where a defendant resides or does business." 29 U.S.C. 1451(d).

This conflict in the circuits places plan trustees in a difficult position, because they have a fiduciary duty to take appropriate steps to collect money owed to the plan. See 29 U.S.C. 1104(a)(1); *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 571 (1985). The plan trustees' fiduciary duty extends to pursuing collection of withdrawal liability. 29 U.S.C. 1381, 1399(b)(1). Because the circuits have reached inconsistent conclusions on the statute of limitations question that this case presents, review by this Court is warranted in order to furnish uniform guidance to plan trustees in the fulfillment of their fiduciary responsibilities under ERISA.

Respondents argue (Br. in Opp. 10-11) that because the majority of multiemployer pension plans are fully funded, the question presented infrequently arises. In support of that proposition, respondents point to a 475-plan survey in which those plans were found to be fully or mostly funded. *Ibid.* (citing The Segal Company, *Survey of The Funded Position Of Multiemployer Plans* 3-4 (1995)). That survey is consistent with a recent PBGC study concluding that MPPAA is achieving its goal of reducing plan underfunding and thereby protecting workers' retirement benefits. See Pension Benefit Guaranty Corp., *The Financial Condition of PBGC's Multiemployer Insurance Program: A Five-Year Report to Congress as Required by Section 4022A(f) of the Employee Retirement Income Security Act of 1974, as amended*, at 3-4 (1996) ("MPPAA's imposition of withdrawal liability on employers that leave underfunded plans has encouraged employers to remain as contributing sponsors, provided an incentive to get plans funded, and increased the funding of plans with departing sponsors."). Collection of withdrawal liability, however, continues to be a major concern for many multiemployer plans that are *not* fully funded. The total underfunding of such plans is estimated at $14 billion.

Id. at 4. And for those underfunded plans, the recent and conflicting appellate decisions discussed above demonstrate that the statute of limitations issue is of recurring importance.

b. Contrary to respondents' assertion (Br. in Opp. 8), resolution of the circuit conflict would affect the outcome of the current case. Under the Ninth Circuit's decision, petitioner's complaint (filed on February 9, 1993) is untimely because it was filed more than six years after the employer's complete withdrawal in March 1985. Similarly, under the view taken by the Seventh Circuit in *Navco* and the district court below, petitioner's action is time-barred because it was filed more than six years after the date on which the employer first missed a payment, February 1, 1987. By contrast, under the view taken by the Third Circuit in *Kahle*, although petitioner's suit to collect the employer's February 1, 1987 payment may be time-barred, petitioner's action is timely with respect to installments due but unpaid thereafter.

3. a. On the merits of the limitations issue, the decision of the court of appeals in this case is incorrect.

MPPAA authorizes a plan fiduciary to bring an action to collect withdrawal liability whenever the plan is "adversely affected by the act or omission of any party under [the withdrawal liability provisions of Title IV of ERISA]." 29 U.S.C. 1451(a). The "act or omission" that adversely affects a plan is the employer's failure to pay its withdrawal liability as required by the Act.

"Withdrawal, in itself, does not visit any adverse effect upon the plan that gives rise to the cause of action." *Joyce*, 871 F.2d at 1123. That is so because an employer does not owe any withdrawal liability on the date of its withdrawal from the plan. See *Schlitz*, 115 S. Ct. at 988 ("[T]he statute makes clear that the withdrawing employer owes nothing until its plan demands payment.").

MPPAA provides that "[a]s soon as practicable" following a withdrawal, the plan sponsor must establish a schedule of payments in accordance with the Act. 29 U.S.C. 1399(b)(1). The first payment is not due until as much as 60 days after the plan sponsor sets that schedule. 29 U.S.C. 1399(c)(2); see 29 U.S.C. 1399(c)(1)(A)(i) ("Actual payment shall commence in accordance with paragraph (2)."). Thus, "MPPAA contemplates that an employer sometimes may pay its actual first installment long after the withdrawal year." *Schlitz*, 115 S. Ct. at 990. Accordingly, not until an employer fails to pay its withdrawal liability when due is a plan sponsor "adversely affected" by an "act or omission" of the withdrawing employer, 29 U.S.C. 1451(a), and it is only then that the plan sponsor has a cause of action to collect withdrawal liability payments.

Under the Ninth Circuit's decision, the statute of limitations always begins to run before a plan sponsor is entitled to file suit. The Ninth Circuit's decision is therefore inconsistent with the principle that "the statute of limitations will [not] be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer* v. *Chapman*, 119 U.S. 587, 602 (1887). See also *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute."); *United States* v. *Wurts*, 303 U.S. 414, 418 (1938) ("It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued.").

Indeed, a rule that the statute of limitations begins on the date of an employer's withdrawal would significantly curtail the ability of plan sponsors to collect withdrawal liability. The Ninth Circuit's decision effectively prevents plan sponsors from collecting any unpaid installment payments that may become due more than six years after the date of the employer's withdrawal. That result cannot be reconciled with the Act, which expressly provides for a payment schedule that may extend as long as 20 years. See 29 U.S.C. 1399(c)(1). Congress could not have intended an employer that has a 20-year payment schedule to avoid the bulk of its liability by making timely payments for six years after it withdraws, and then refusing to make any further payments on the ground that the statute of limitations has already expired.[6]

b. In our view, petitioner's complaint is not time-barred to the extent it seeks payments from the employer that became overdue on or after a date six years prior to the filing of the complaint. Cf. Compl. ¶¶ 26, 27 (seeking the entire amount of withdrawal liability or, alternatively, the amount of the delinquent monthly payments owed between February 1987 and the time of trial). Petitioner filed its complaint on February 9, 1993, more than six years following the employer's first missed payment on February 1, 1987, but less than six years following the employer's next scheduled payment. Thus, petitioner has

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[6] The Ninth Circuit's holding that petitioner's claim arose on the date of the employer's withdrawal also is difficult to reconcile with this Court's decision in *Schlitz*, *supra*. There, the pension plan argued that an employer's withdrawal liability payment schedule included interest for the year in which withdrawal occurred. In rejecting that contention, the Court observed that the "withdrawing employer's debt does not arise" at that time, because "the statute makes clear that the withdrawing employer owes nothing until its plan demands payment." 115 S. Ct. at 988.

timely sued to collect the employer's unpaid scheduled payments due within the six years prior to February 9, 1993.

The fact that petitioner did not file suit within six years after the employer's first missed payment on February 1, 1987 should not bar petitioner's suit to collect the remaining missed payments. The view taken by the Seventh Circuit—that a fund has "only one *claim* against the employer," *Navco*, 3 F.3d at 172—is based on an incorrect reading of the Act.

The court in *Navco* concluded that although MPPAA "permit[s] an employer to amortize [its withdrawal liability] over 20 years, the whole amount is presumptively due at the outset." *Navco*, 3 F.3d at 172 (citation omitted). The Act, however, compels the opposite conclusion. Although MPPAA permits an employer to prepay all or a portion of its withdrawal liability, 29 U.S.C. 1399(c)(4), MPPAA first requires the plan sponsor to demand payments in accordance with a schedule that amortizes the debt in level payments pursuant to a statutorily prescribed formula. 29 U.S.C. 1399(c)(1)-(3). Absent default by the employer, 29 U.S.C. 1399(c)(5); 29 C.F.R. 4219.31(b)-(c), the plan sponsor can neither demand payment for the entire outstanding amount of the employer's withdrawal liability nor bring a collection suit under the Act for the full amount. Moreover, even upon the employer's default, the outstanding amount of the withdrawal liability is not "presumptively due" (*Navco*, 3 F.3d at 172), because 29 U.S.C. 1399(c)(5) places the decision whether to accelerate some or all of the outstanding liability within the discretion of the plan sponsor. For those reasons, unless a plan sponsor has accelerated payment of the employer's entire liability following the employer's default, the plan sponsor's cause of action to collect an overdue payment, see

29 U.S.C. 1401(b)(1), 1451(a), arises each time an employer misses a scheduled payment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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